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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS LOPEZ,

Defendant and Appellant.

G040265

(Super. Ct. No. 90CF00632)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Pamela Ratner Sobeck, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant appeals from his conviction for the first degree murder of his former stepdaughter. He argues that the court erroneously instructed the jury with CALCRIM No. 522, creating a risk that the jury did not properly assess evidence of provocation that might have reduced his crime to second degree murder. We find the instruction was properly given and therefore affirm.

## I

### FACTS

In 1979 or 1980, defendant married Simona Bahuman. At the time of her marriage, Bahuman had four children ages two to 11 years. The oldest girl, Olivia, was 10 at the time.<sup>1</sup> In 1982, Bahuman gave birth to a child with defendant, named Jesus Lopez (called Jesse). The family lived in Santa Ana.

Defendant did not have a good relationship with the children, and by approximately 1988, he had moved out of the house. Defendant, however, treated Olivia “differently,” and the other children noticed he had begun staring at Olivia inappropriately. In 1989, Francisco, who was 11 at the time, witnessed defendant and Olivia having sexual intercourse on the sofa. When defendant saw Francisco, he pushed Olivia away. Olivia ran to the bathroom, and defendant threatened Francisco and told him not to tell anyone.

On February 22, 1990, defendant came to Simona’s home. A verbal altercation between defendant, Olivia and Simona followed, apparently about Olivia’s relationship with her boyfriend, Steven DeLeon. Defendant demanded to know why Olivia was with her boyfriend, and she responded that it was none of his business. Olivia had been dating DeLeon for approximately eight months, and defendant disapproved of their relationship. Simona ordered defendant to leave or she would call the police. In

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<sup>1</sup> As of the time of the incident that led to this case, Olivia was 20 and younger daughter Eileen was 15. Jesse was eight.

apparent response, defendant drove away from the home and fired several gunshots into the air.

The next day, Olivia, Eileen and Jesse were at DeLeon's home, which was not far from Simona's home. Olivia was talking to DeLeon when defendant drove by. He stopped his car and an argument followed. At some point, Olivia told Eileen and Jesse to walk home, and they did. An argument followed, and at one point defendant threatened to kill DeLeon. Defendant told Olivia to go home. DeLeon threw a broomstick at defendant's car as he drove away. In a subsequent interview, Jesse stated that DeLeon began throwing rocks at defendant's vehicle. DeLeon's brother later acknowledged that he and DeLeon had thrown a flower pot at defendant as he drove away.

When Olivia arrived home, she told Eileen about the argument. Eileen called the police, who informed her they could not do anything if defendant was not there at the time. Eileen then went outside to speak to two young neighbors, Noemi Lara, age 13, and Sandy, age eight.

Defendant arrived approximately five minutes later, clearly very angry. He ordered Eileen to get Olivia, who was inside. Eileen refused, but defendant repeated his demand, and may have brandished a weapon at this point. Eileen called Olivia, and when she appeared, defendant stood close to her, again demanding to know why she was seeing DeLeon. Olivia told defendant it was none of his business and asked why he cared.

Defendant then pushed his way inside and punched Olivia in the head and face. When Olivia slapped him in response, defendant pulled out a .22-caliber handgun. As Eileen tried to intervene to protect Olivia, she was shot in her right forearm, and Olivia was shot in the back. Defendant shot her twice more, the third time in the head. Several of defendant's shots were in the direction of Jesse, who hid behind the couch and managed to avoid being hit. Eileen at one point attempted to jump on defendant to stop him, and defendant shot her again, this time in the left shoulder. Defendant then fled

toward his car, firing two rounds at Noemi and Sandy Lara, who were hiding behind a camper parked in the driveway. Neither was hit, but as defendant fled, he threatened that he would be back for them.

Police were called and both Olivia and Eileen were transported to the hospital. Olivia died from her injuries. Eileen sustained two gunshot wounds, to her forearm and shoulder.

In October 2007, the district attorney filed an amended information charging defendant with murder (Pen. Code, § 187,<sup>2</sup> count one); attempted murder (§§ 664, 187, subd. (a), count 2); and assault with a firearm (§ 245, subd. (a)(2), counts three, four and five). The information also alleged that counts one and two were serious felonies (§ 1192.7, subd. (c)), and that defendant personally used a firearm (§§ 12022.5, subd. (a), 1192.7, 667.5.) Defendant pled not guilty.

After a jury trial, defendant was found guilty on all counts, finding that the murder was in the first degree and that defendant personally used a firearm in the commission of count two. (The section 12022.5, subdivision (a) enhancement was dismissed due to a failure to provide the jury with an appropriate verdict form.) The court sentenced defendant to state prison for 39 years to life.

## II

### DISCUSSION

The only issue defendant raises on appeal is whether the court erred by instructing the jury with CALCRIM No. 522. He argues the instruction was confusing and created a substantial risk that the jury did not properly assess evidence of provocation in the context of premeditation and deliberation.

This is relevant because what would otherwise be deliberate and premeditated first degree murder may be mitigated to second degree murder if the jury

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<sup>2</sup> Subsequent statutory references are to the Penal Code.

finds that the defendant “formed the intent to kill as a direct response to . . . provocation and . . . acted immediately,” i.e., without deliberation or premeditation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

Provocation sufficient to mitigate a murder to second degree murder requires a finding that the defendant’s mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296 (*Fitzpatrick*).) Thus, a defendant who is subjectively prevented from deliberating because of provocation is guilty of second degree rather than first degree murder. (*Id.* at pp. 1294-1296.)

We review jury instructions de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1.) “In reviewing a challenge to jury instructions, we must consider the instructions as a whole. [Citations.] We assume that the jurors are capable of understanding and correlating all the instructions which are given to them. [Citation.]” (*Fitzpatrick, supra*, 2 Cal.App.4th at p. 1294.) Taken together, CALCRIM Nos. 521 and 522, as given here, adequately explain that provocation can mitigate first degree murder to second degree murder.

CALCRIM No. 521 states that a verdict of first degree murder requires a finding of deliberation and premeditation, and that all other murders are of the second degree. It further states that in order to determine that the defendant premeditated and deliberated, the jury must find that he “carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.” The instruction explains that “[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.”

The jury was also instructed with CALCRIM No. 522, which provides: “Provocation may reduce a murder from first degree to second degree . . . . The weight

and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.”

The instructions clearly informed the jury that it could not convict defendant of first degree murder if it found that his decision to kill was made “rashly, impulsively, or without careful consideration” and that it could consider provocation in deciding whether the crime was first or second degree murder. Moreover, CALCRIM No. 521 as given here distinguished between first and second degree murder only on the basis of premeditation and deliberation. Taken together, which defendant fails to do, these instructions adequately informed the jury that if it found that either defendant acted rashly or impulsively as a result of provocation, he did not deliberate and premeditate. The jury could thus conclude on that basis that the crime was second degree murder rather than first degree murder.

Defendant’s next criticism of CALCRIM No. 522 is that unlike CALJIC No. 8.73, it fails to convey the idea that provocation is not limited to deciding whether the defendant committed murder or manslaughter. The instruction given, however, clearly stated that “Provocation may reduce a murder from first degree to second degree . . . .” We therefore find the instruction did not create a “risk of juror confusion” on this point.

Finally, defendant argues that by advising the jury that “the weight and significance, of the provocation, if any, are for you to decide,” the jury was wrongly permitted to disregard evidence which raises a reasonable doubt as to premeditation and deliberation. He claims the inclusion of the word “significance” permits the jury unlimited discretion to “discount even strong evidence of provocation” sufficient to create a reasonable doubt.

We agree with respondent that this instruction is not problematic, nor does it alter the burden of proof. Defendant claims that the jury could have decided, for

example, that the “significance” of the provocation was undercut by defendant’s prior conduct with Olivia. In the context of the instruction, however, that is not what the jury was told. As noted above, we presume that jurors understand the instructions as given to them. (*Fitzpatrick, supra*, 2 Cal.App.4th at p. 1294.) The use of “significance” in CALCRIM No. 522 is consistent with other instructions, such as the jury deciding what to believe when there is a conflict in the evidence. (CALCRIM No. 302.) Neither the language or context of the instruction permits the jury to ignore evidence or shift the burden of proof on this issue, which is made very clear by CALCRIM No. 521. (“The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime.”)

When taken together with the other instructions and in context, we find that CALCRIM No. 522 was properly given. Therefore, we find no error.

### III

#### DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O’LEARY, J.